



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT MACHAKOS

MISCELLANEOUS CIVIL APPL NO. 403 OF 2019

KESIAH WANGUI NJORGE.....APPLICANT

VERSUS

PETER KIIHIKA NJUGUNA.....RESPONDENT

RULING

1. This Ruling is in relation to the application dated, **3.11.2019** and filed in court on even date. The application is vide notice of motion brought under Section 18(1)(b) (ii) and (2) of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules as well as Article 159 of the Constitution. What remains to be determined are two prayers firstly for stay of proceedings in Civil Case 315 of 2019 pending hearing and determination of the criminal appeal as well as transfer of the civil case number 315 of 2019 in the Chief Magistrates Court at Mavoko to any other subordinate court of competent jurisdiction.

2. In support of the application is affidavit deponed by Mbiyu Kamau advocate who averred that the applicant was convicted and sentenced for the offence of obtaining goods by false pretenses and that the applicant being dissatisfied with the decision filed an appeal against the same that is yet to be heard by the high court. Counsel averred that the criminal matter was heard in the trial court by the head of station and he had apprehension that justice may not be done in the civil matter hence it would be in the interest of justice that the application be allowed.

3. In reply to the application Mutavi Mulwa advocate averred vide affidavit deponed on 16.4.2019 that the civil matter is being heard by a different judicial officer from the one who heard the criminal matter that the applicant is dissatisfied with. Counsel averred that a person seeking transfer of a case must demonstrate reasonable apprehension that he would not get a fair trial and he contended that the applicant has not demonstrated the same. Counsel averred that the parties herein reside in Utawala and Mlolongo and the court with jurisdiction to entertain the civil suit is that which is near where the parties reside. Counsel cited section 44 and 45 of the Evidence Act and the case of *Trang v Alberta* and averred that judgements in criminal proceedings may not be conclusive proof of facts. Counsel further averred that Section 193A of the Criminal Procedure Code provides that civil and criminal proceeding may run concurrently even when the same matters are substantially in issue in both proceedings.

4. In rejoinder Mr Mbiyu Kamau averred that because the judicial officer who heard the criminal matter is the head of station, there is likelihood that as a senior, her decision may influence the officer handling the civil matter being that the decision was made by her senior.

5. The court directed that the matter be canvassed vide submissions. The applicant's submissions are not on record. Counsel for the respondent vide submissions filed on 20.11.2019 placed reliance on the case of **Mwangi Stephen Muriithi v Attorney General (1981) eKLR** where the conditions for grant of an order for transfer of suit were laid out. Counsel submitted that an unfavourable decision would not be reason enough to seek an order for transfer as the dissatisfaction could be addressed by appealing against the decision. In this regard counsel cited the case of **Sheikh Ali Said Birhanu & Hussein Mohamed Alio v Abdi Adan Abubakar & 2 Others (2019) eKLR**. Counsel also cited the case of **Captain Moses Kariuki Wachira v Joseph Mureithi Kanyita & 3 Others (2013) eKLR** where it was observed that "Reverting for a moment to section 45 of the Evidence Act, the same clearly spells out that the judgement obtained in criminal proceedings must necessarily be in the public interest... As a result, I see considerable benefit in allowing into evidence the certified copy of the proceedings and the judgement in Criminal Case No. 1110 of 2010 in terms of the overriding objective of the Civil Procedure Act as regards the expeditious disposal of this suit before Court"

6. On the issue of stay of proceedings counsel cited Section 193A of the Criminal Procedure Code.

7. The issue to be determined is whether the court can grant the orders sought.

8. With regard to the prayer for stay of proceedings, the test for stay of proceedings was stated by Ringera J in the case of **Global Tours &**

Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 thus;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”

9. In **Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 Others** (2013) eKLR the learned Judges stated the principles to be applied in considering an application for stay of proceedings as thus:-

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

10. Further in the case of **Kenya Power & Lighting Ltd v Esther Wanjiru Wokabi** (2014) eKLR it was observed that:

“the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

- a) Whether the applicant has established that he/she has a prima facie arguable case.
- b) Whether the application was filed expeditiously and
- c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”

11. In **R v Horseferry Road Magistrates Ex parte Bennet** [1994] 1 A.C. 42 the House of Lords stated:

“.....the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court’s conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of the jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the Court’s process has been abused.”

12. In this regard I am aware that whereas the proceedings in the criminal trial may be used as evidence in the civil proceedings and that the applicant has filed an appeal against the criminal conviction, i have not been given the benefit of seeing the pleadings in the civil matter that the applicant seeks to stay. Hence I cannot out of conjecture know what the cause of action is in the said civil matter. In this regard from the evidence presented before me I am not able to tell what prejudice the applicant will suffer if the civil matter is allowed take its course in the trial court. It would be in the circumstances expedient to allow the parties to be heard in the trial court and if dissatisfied with the proceedings therein, the applicant still has avenues in the court hierarchy to ventilate her dissatisfaction with the same. For that reason I decline to grant prayer 3 in the application.

13. With regard to the prayer for transfer of the suit to another subordinate court of competent jurisdiction, regard must be made to the enabling law which empowers such court to hear such a case and in this regard which court is within the local limits where the cause of action is situate?

14. Section 12 and 15 of the CPA, require suits to follow the subject matter in terms of territorial jurisdiction. Section 18(1) of the CPA is to the effect that “*On the Application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice the High Court may at any stage:*

- (a) **Transfer any suit or other proceedings pending before it for trial or disposal to any subordinate to it competent to try or dispose of the same; or**
- (b) **Withdraw any suit of other proceedings pending in any court subordinate to it, and thereafter-**
 - (i) **Try or dispose of the same,**
 - (ii) **Transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same,**
 - (iii) **Transfer the same for trial or disposal to the court from which it was withdrawn.**

15.15. The principles upon which this court will exercise its discretion as regards the transfer of cases have been well laid down in the Ugandan case of **David Kabungu v Zikarenga High Court Misc. App. 36 of 1995 [1995] 3 KALR** in which Okello J stated

as follows:-

“Section 18(1) of the Civil Procedure Act gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. ... there are also authorities that the principal matters to be taken into consideration are balance of convenience, questions of expenses, interest of justice and possibilities to undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the duplication must be refused.”

16. In addition, the overriding objective of the Civil Procedure Act and Rules made thereunder is to facilitate the just, expeditious, proportionate and or affordable resolution of civil disputes governed by the Act. In the furtherance of this overriding objective, the courts are mandated to ensure the just determination of proceedings, **efficient disposal of business of the court, the efficient use of available judicial and administrative resources** and the timely disposal of proceedings at a cost affordable by the respective parties. I surmise that Mavoko Law courts has able officers capable of handling the civil matter as nothing has been brought to the table to demonstrate that the applicant will not be heard fairly in Mavoko Law Courts. A transfer of the suit would not be in the best interest of both parties and that the plaintiff may suffer prejudice through delayed justice in having the suit transferred to another court. Further the respondent averred that Mavoko magistrate’s court is a stone throw away from where the parties reside and there is no other court and that being the position the Mavoko law courts is the nearest and suitable to handle the matter. There is no justification whatsoever why the suit should be transferred to another court outside Mavoko. In any event the judicial officer who currently handles the civil case is not the one who heard the criminal case. The applicant’s fears that the other judicial officer may become beholden to the head of station is far-fetched and not convincing in view of the fact that all judicial officers took oath to hear cases without fear or favour and each exercises independence under the authority of the constitution (Article 160). The applicant appears to be on a forum shopping which is untenable. If litigants are given a leeway to choose where their cases are to be heard then there would be chaos, confusion and anarchy. I am of the considered view that the applicant’s fears are misplaced as there are avenues for redress in the event she is dissatisfied with the eventual decision. This then leads me to come to the finding that prayer 4 of the application is not merited.

17. In the result, I find the instant application lacks merit and an abuse of the court process. The same is dismissed with costs.

Orders accordingly.

Dated and delivered at **Machakos** this 3rd day of **December, 2019**.

D. K. Kemei

Judge